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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

R.A.V.,
Petitioner,

v.

ST. PAUL, MINNESOTA,
Respondent.

On Writ of Certiorari to the Supreme Court of Minnesota

BRIEF OF CENTER FOR INDIVIDUAL RIGHTS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF CENTER FOR INDIVIDUAL RIGHTS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

This *amicus curiae* brief is submitted in support of petitioner, R.A.V. By letters filed with the Clerk of the Court, petitioner and respondent have consented to the filing of this brief.

INTERESTS OF *AMICUS CURIAE*

The Center for Individual Rights ("CIR") is a non-profit public interest law firm. CIR was founded in 1989 to provide free legal representation to deserving clients who cannot otherwise afford to obtain legal counsel. Through its litigation activities, CIR seeks to advance respect for individual rights, including both civil and

economic liberties, adherence to the rule of law, and the preservation of a government of limited powers.

A large number of CIR's cases have involved the First Amendment. *See, e.g., Levin v. Harleston*, 752 F. Supp. 620 (S.D.N.Y. 1990); *Iota Xi Chapter, Sigma Chi Fraternity v. George Mason University*, Civ. No. 9-785-A (E.D. Va. 1991); *Rosenberger v. Rector and Visitors of the University of Virginia*, Civ. No. 91-0036-C (W.D. Va. 1991). CIR is one of the few public interest firms to regularly represent students, college newspaper editors and professors whose First Amendment rights are infringed by academic administrators.

CIR believes that, in recent years, governmental entities and courts have increasingly circumscribed fundamental First Amendment freedoms in the pursuit of political objectives such as social justice, fairness, or sensitivity. This case is another example of such limitations on First Amendment freedoms. CIR believes that the Court's decision in this case could have far-reaching effects on cases involving governmental bans on speech that is deemed offensive on grounds of race, religion, gender or political viewpoint. These cases are the core of CIR's legal practice. Because of its significant experience in litigating cases involving these issues, CIR is well situated to brief this Court on the importance of issues beyond the immediate concern of the parties.

STATEMENT OF THE CASE

This case arises from crude and repugnant conduct. Petitioner is accused of having burned a cross inside the fenced yard of an African-American family's house. If the City's charges are proven, petitioner will be subject to prosecution for crimes such as trespass and arson.

This case does not concern these crimes. Instead, it concerns the power of the City of St. Paul to criminally punish petitioner under a municipal "bias-motivated disorderly conduct ordinance." *Matter of Welfare of R.A.V.*, 464 N.W.2d 507, 509 (Minn. 1991); *see* St. Paul, Minn., Ordinance § 292.02 (1990). As drafted, that ordinance makes it a misdemeanor to display "a symbol, object, appellation, characterization or graffiti," that one knows or "has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." *R.A.V.*, at 508.

After the trial court struck down the anti-bias ordinance on First Amendment grounds, the City of St. Paul appealed, urging that the anti-bias ordinance be narrowly construed to reach only conduct unprotected by the First Amendment. The Minnesota Supreme Court agreed, and held the ordinance applicable only to displays that amount to "fighting words" or incitement to imminent violence, *R.A.V.*, 464 N.W.2d at 510 (*quoting Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942), and *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)). The Court also summarily concluded that "the ordinance is a narrowly tailored means toward accomplishing the compelling governmental interest in protecting the community against bias-motivated threats to public safety and order," *id.* at 511, and thus the ordinance survived First Amendment scrutiny.

SUMMARY OF ARGUMENT

1. St. Paul's bias-motivated disorderly conduct ordinance is plainly a content-based restriction on expressive conduct. The ordinance applies only to a limited category of symbols that "arouse[] anger, alarm, or resentment in others *on the basis of race, color, creed, religion or gender*," St. Paul, Minn., Ordinance § 292.02 (1990) (emphasis added); it does not apply to symbols that either do not offend, or that offend based on other grounds —for example, personal characterisitcs, politics, economic or class status, or sexual preference.

Indeed, the St. Paul ordinance does not merely restrict the *subject matter* of expressive conduct, but also bans

the use of symbols that express a particular *viewpoint*. As interpreted by the Minnesota Supreme Court, the ordinance appears targeted only at some symbols that offend on the basis of race, religion, and gender—namely, those that express messages of racial hatred, religious intolerance and gender inequality, and not symbols of harmony or equality. *R.A.V.*, 464 N.W.2d at 508, 511.

2. Because St. Paul's anti-bias ordinance prohibits expressive conduct based upon its content, it is subject to the strictest judicial scrutiny. *Widmar v. Vincent*, 454 U.S. 263, 276 (1981); *First National Bank v. Bellotti*, 435 U.S. 765, 786 (1978). Indeed, viewpoint-based restrictions like the St. Paul ordinance are virtually never permitted under the First Amendment. The level of judicial scrutiny demanded by the First Amendment is not affected by the fact that St. Paul's ordinance has been interpreted by the Minnesota Supreme Court to apply only to "fighting words." Even assuming that a State may forbid *all* fighting words, restrictions that single out *some* fighting words because they express a proscribed message are subject to the strict scrutiny applicable to other content-based restrictions. Justice Black's classic concurring opinion in *Cox v. Louisiana*, 379 U.S. 536, 581 (1965), states the rule concisely:

> I have no doubt about the general power of Louisiana to bar all picketing on its streets and highways. . . . But by specifically permitting picketing for the publication of labor union views, Louisiana is attempting to pick and choose among the views it is willing to have discussed on its streets. . . . This seems to me to be censorship in a most odious form.

See also Kucharek v. Hanaway, 902 F.2d 513, 517 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 713 (1991).

It is no answer to say that St. Paul's anti-bias ordinance does not distort the marketplace of ideas because fighting words are "no essential part of any exposition of ideas." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572

(1942). Quite apart from the skepticism expressed by commentators and this Court about *Chaplinsky*'s dictum, Minnesota is seeking to punish petitioner precisely *because* he expressed ideas—specifically, "virulent notions of racial supremacy." *R.A.V.*, 464 N.W.2d at 508. Moreover, this Court has long recognized that symbols are "a primitive but effective way of communicating ideas." *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 634 (1943). Because it criminalizes expressive conduct that communicates a particular idea, St. Paul's ordinance is subject to the strictest judicial scrutiny.

3. Neither of the two interests that might possibly be served by St. Paul's anti-bias ordinance withstands strict scrutiny. First, the State cannot assert a compelling interest in forbidding the use of bias-motivated symbols in order to maintain public order because it already possesses a content-neutral law prohibiting all "fighting words," Minn. Stat. Ann. § 609.72, Subd. 1(3) (1990) (construed in *In re S.L.J.*, 263 N.W.2d 412 (Minn. 1978)). *See Texas v. Johnson*, 491 U.S. 397, 410 (1989). Moreover, even if the State's interest in preserving public order were implicated, the anti-bias ordinance would be inadequately tailored to achieve that end because it bans only a limited category of "fighting symbols." The selective treatment of symbols in the present case is analogous to *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975), where this Court held that an ordinance forbidding drive-in theaters from showing movies involving nudity was an underinclusive means of preventing traffic hazards: other movies, not involving nudity, could also create traffic hazards but were not prohibited.

Second, the anti-bias ordinance cannot be defended on the ground that the State has a compelling interest in banning messages of racial and religious bigotry and intolerance. Although these messages are inconsistent with this Nation's highest aspirations, this Court has repeatedly held that the First Amendment does not permit a State to prohibit the communication of ideas simply because

they are offensive or at odds with national policies. As Justice Jackson said in *West Virginia Board of Education v. Barnette*, 319 U.S. at 642, "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion." The State may no more punish petitioner's cross-burning because of the idea he conveyed by his act than it could forbid the publication of books or sermons expressing that idea.

ARGUMENT

I. ST. PAUL'S BIAS-MOTIVATED DISORDERLY CONDUCT ORDINANCE IS A CONTENT-BASED RESTRICTION ON EXPRESSIVE CONDUCT.

St. Paul's bias-motivated disorderly conduct ordinance is a content-based restriction on expressive conduct.[1] As we show below, the ordinance is content-based because it is

[1] Petitioner's challenged conduct in this case was not his spoken or written words; rather, it was his "participat[ion] in burning a cross inside the fenced yard of an African-American family's home." 464 N.W.2d at 508. The issue, however, is whether an "intent to convey a particularized message was present and [whether] the likelihood was great that the message would be understood by those who viewed it." *Spence v. Washington*, 418 U.S. 405, 410-11 (1974). Applying this test, the Court has held the First Amendment applicable to sit-ins protesting segregation, *Brown v. Louisiana*, 383 U.S. 131 (1966), burning the American flag, *Texas v. Johnson*, 491 U.S. 397 (1989), and displaying a red flag, *Stromberg v. California*, 283 U.S. 359 (1931). The State concedes that petitioner's cross-burning clearly falls within the category of expressive conduct. *See* Appellant's Brief at 16, *Matter of Welfare of R.A.V.*, 464 N.W.2d 507 (Minn. 1991) (No. C8-90-1656) ("The State agreed that the act of cross-burning was 'expression' in the sense that a message was intended to be conveyed."). The State's concession was clearly correct: petitioner is not accused because of his trespass, his arson or his other misconduct, but because of the message conveyed by the symbols he used.

"the content of the [petitioner's] speech that determines whether it is within or without" the regulation's prohibition. *Carey v. Brown*, 447 U.S. 455, 462 (1980).[2]

The St. Paul ordinance applies only to a limited category of symbols with a proscribed content: specifically, the ordinance bans symbols which one knows or has reasonable grounds to know will "arouse[] anger, alarm, or resentment in others *on the basis of race, color, creed, religion or gender*." St. Paul, Minn., Ordinance § 292.02 (1990) (emphasis added). Thus, the regulation forbids the use of symbols with some contents (ones that offend based on race, religion or gender), but not others (symbols that either do not offend, or that offend based on other grounds —for example, personal characteristics, politics, economic or class status, or sexual preference). A more explicit regulatory distinction on the basis of content would be difficult to posit.[3]

The Minnesota Supreme Court's opinion confirms that the St. Paul ordinance is a content-based restriction. That Court defended the ordinance by declaring that petitioner's "burning cross is . . . an unmistakable symbol of violence and hatred based on virulent notions of racial supremacy" and that "[i]t is the responsibility . . . of diverse communities to confront such notions in whatever form they appear." *R.A.V.*, 464 N.W.2d at 508. Similarly, the Minnesota Supreme Court's opinion quotes with approval a law review article that observes how "certain symbols and regalia," like swastikas and burning crosses, should be prohibited because they "*carry a clear message*

[2] *See also Police Dep't v. Mosley*, 408 U.S. 92, 95-96 (1972); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209, 215 (1975).

[3] Indeed, the St. Paul ordinance specifically identifies two symbols—the burning cross and the swastika—whose content automatically render the regulation applicable. *R.A.V.*, 464 N.W.2d at 508.

of racial supremacy, hatred, persecution, and degradation of certain groups." [4]

Thus, it is clear that the St. Paul ordinance distinguishes between symbols based squarely on the messages they communicate: if the symbol conveys a message that may provoke violence because of its racial, religious or gender content, then it is prohibited. The restriction at issue in this case is therefore analogous to the restriction struck down in *Mosley*, where "[t]he operative distinction [was] the message on a picket sign," 408 U.S. at 95, and *Texas v. Johnson*, where Texas' flag-protection law "depended on the likely communicative impact of [petitioner's] expressive conduct." 491 U.S. at 411.[5]

Indeed, the St. Paul ordinance is not merely a restriction on the *subject matter* of expressive conduct.[6] As interpreted by the Minnesota Supreme Court, the ordinance

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[4] Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2365-66 (1989) (emphasis added).

[5] It cannot seriously be contended that the St. Paul ordinance is intended only to prevent public violence and other "secondary effects" within the meaning of *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-48 (1986) (upholding ordinance that prohibited adult movie theaters from locating within 1,000 feet of residential zones, schools, parks, or churches, because ordinance was justified without reference to the content of the regulated speech, but was instead aimed at the "secondary effects of such theaters on the surrounding community") (emphasis omitted). As this Court made clear in *Boos v. Barry*, 485 U.S. 312, 321 (1988), "[l]isteners' reactions to speech are not the type of 'secondary effects' we referred to in *Renton*."

[6] This Court has, of course, repeatedly held that subject-matter prohibitions constitute content-based restrictions for First Amendment purposes. *See Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 537 (1980) ("First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion

apparently forbids expressive conduct based upon the *viewpoint* expressed by the actor on certain subjects. Thus, the ordinance is termed the "*bias-motivated* disorderly conduct" ordinance, *R.A.V.*, 464 N.W.2d at 509 (emphasis added), and is directed only at bias-motivated "expressions of hatred." *Id.* at 511. Importantly, symbols of religious harmony apparently are not reached by the regulation, nor are symbols of racial or gender equality or pride.[7] Instead, according to the Minnesota Supreme Court, the ordinance singles out only those symbols dealing with these subjects if they express "notions of racial supremacy," *R.A.V.*, 464 N.W.2d at 508, religious persecution or intolerance, or gender degradation. These are ugly and brutal ideas, deserving the deepest contempt. But they are nonetheless viewpoints on the subjects of racial, religious and gender relations, and the selective prohibition of the St. Paul ordinance is therefore a viewpoint-based restriction.

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of an entire topic"); *see also Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 230 (1987) (invalidating Arkansas scheme that taxed general interest magazines, but exempted newspapers and religious, professional, trade, and sports journals); *Carey*, 447 U.S. at 462 n.6 ("It is, of course, no answer to assert that the Illinois statute does not discriminate on the basis of the speaker's viewpoint, but only on the basis of the subject matter of his message."); *Police Dep't v. Mosley*, 408 U.S. at 95 ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.").

[7] Under the Minnesota Supreme Court's interpretation of St. Paul's anti-bias ordinance, that regulation presumably would not reach symbols of racial and religious tolerance and harmony—for example, symbols of the Reverend Jesse Jackson's Rainbow Coalition or symbols that represented inter-faith or inter-racial marriages—even when used in circumstances where particular audiences might react with anger or violence. Likewise, symbols of religious and racial pride (but not supremacy or exclusivity)—perhaps a photograph of the Ayatollah Khomeini—could even more readily provoke anger or violence, but would not appear to be caught by the anti-bias regulation.

II. THE CONTENT-BASED RESTRICTIONS IMPOSED BY ST. PAUL'S ORDINANCE DEMAND THE MOST EXACTING JUDICIAL SCRUTINY.

This Court has repeatedly held that "cases in which a State undertakes to regulate speech on the basis of its content" require the "most exacting scrutiny." *Widmar v. Vincent*, 454 U.S. 263, 276 (1981); *see Carey*, 447 U.S. at 464. Under this standard, the State must demonstrate that its regulation is the least restrictive means to accomplish a "compelling" governmental objective. *See First National Bank v. Bellotti*, 435 U.S. 765, 786 (1978); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231 (1987); *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 45 (1982). Moreover, where viewpoint-based restrictions are involved, even the most compelling state interest will ordinarily be insufficient to sustain the law. "The general principle . . . is that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others." [8]

The fact that the St. Paul ordinance has been interpreted by the Minnesota Supreme Court to apply only to "fighting words" does not diminish the level of judicial scrutiny demanded by the First Amendment. Even assuming that *Chaplinsky* may be read broadly to prohibit all "fighting words," [9] a State may not choose to forbid only those "fighting words" with a particular content or message. On the contrary, even where a state has the power to forbid speech under a content-neutral prohibition, this Court has consistently subjected content-based

[8] *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984).

[9] As discussed below, there are compelling reasons to view the "fighting words" doctrine narrowly, particularly in the context of speech or expressive conduct concerning issues of general public importance. *See* pp. 15-16 *infra*.

restrictions on particular subcategories of such speech to the strictest scrutiny.

For example, it was assumed in *Cox v. Louisiana* that a State may prohibit all picketing in certain areas, but the Court nonetheless held that a State may not permit picketing related to specific issues (such as labor disputes) while banning all other picketing unless that distinction serves a compelling state interest. Justice Black made this point in his concurring opinion:

> This Louisiana law opens the streets for union assembly, picketing, and public advocacy, while denying that opportunity to groups protesting against racial discrimination. . . . I have no doubt about the general power of Louisiana to bar all picketing on its streets and highways. . . . But by specifically permitting picketing for the publication of labor union views, Louisiana is attempting to pick and choose among the views it is willing to have discussed on its streets. It thus is trying to prescribe by law what matters of public interest people whom it allows to assemble on its streets may or may not discuss. This seems to me to be censorship in a most odious form.

379 U.S. at 580-81.[10]

Similarly, in *Papish v. Board of Curators of the University of Missouri*, 410 U.S. 667 (1973), this Court strictly scrutinized university regulations regarding distribution of a campus publication because such regulations turned on the "*content* of the newspaper rather than the time, place, or manner of its distribution." *Id.* at 670 (emphasis in original). Striking down the regulations, the Court expressly noted that it had "repeatedly ap-

[10] *See also Police Dep't v. Mosley*, 408 U.S. 92 (1972) (holding that a Chicago ordinance violated the Equal Protection Clause of the Fourteenth Amendment because it impermissibly distinguished between labor picketing and all other peaceful picketing); *Carey v. Brown*, 447 U.S. 455 (1980) (holding unconstitutional a similar Illinois statute).

proved" of "time, place or manner" regulations that would have prohibited the speech in question, precisely because such regulations were applied across the board, without reference to the content of the speech that they regulated.

Likewise, in *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975), the Court indicated that a State could require drive-in movie theaters to screen their offerings from the view of passing motorists. *Id.* at 215 n.13. But the Court nonetheless invalidated a content-based prohibition against the display of films involving nudity at drive-ins after subjecting the ordinance to strict scrutiny.

Finally, in *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987), the Court struck down an Arkansas magazine tax that exempted religious, professional, trade, and sports magazines printed and published in the state. The Court noted that Arkansas could constitutionally apply a nondiscriminatory tax on all magazines.[11] However, because the tax before the Court discriminated between magazines based upon their content, "the State [had to] show that its regulation was necessary to serve a compelling state interest and [was] narrowly drawn to achieve that end." [12]

The same rule applies to St. Paul's selective prohibition against some fighting words. St. Paul could constitutionally prohibit all fighting words—just as Louisiana could have banned all picketing in *Cox*, just as the University of Missouri could have restricted the distribution of all campus publications in *Papish*, and just as Arkansas could have imposed uniform taxes on all publications in *Ragland*. But, just as strict judicial scrutiny was required when Louisiana, the University of Missouri, and Arkansas adopted narrower, content-based restrictions, St. Paul must also satisfy a strict scrutiny standard if it wishes to prohibit only those fighting words dealing with proscribed subjects.

[11] 481 U.S. at 229. *See Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 586-87 (1983); *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936).

[12] *Id.* at 231.

Judge Posner recently adopted precisely this analysis in a case involving a Wisconsin obscenity statute. He reasoned that, although under existing Supreme Court precedents the State could clearly forbid all obscenity, a content-based prohibition against only some types of obscenity would be subject to the highest level of First Amendment scrutiny:

> It is easy to imagine a statute that would not exert the state's full power over obscenity yet would violate the First Amendment. A statute forbidding the sale of obscene books unless the book confined its depictions to procreative sex would be one. *The state is permitted to suppress obscenity but it is not permitted to distort the marketplace of erotic discourse by suppressing only that obscenity which conveys a disfavored message.* It makes no difference whether this conclusion is premised on the equal protection clause as informed by policies drawn from the free-speech and free-press clauses or on the speech and press clauses themselves.[13]

Fundamental First Amendment precepts require that St. Paul's content-based restrictions be subjected to the strictest judicial scrutiny. Basic to the First Amendment is the notion that the state may not remove certain issues from public discourse; permitting this would allow gov-

[13] *Kucharek v. Hanaway*, 902 F.2d 513, 517 (7th Cir. 1990) (citations omitted) (emphasis added), *cert. denied*, 111 S. Ct. 713 (1991). Plaintiff had contended that a statute prohibiting the sale of obscene materials was unconstitutionally vague. In reversing the district court, the Seventh Circuit rejected that challenge but noted that the statute would have been susceptible to First Amendment challenge had it underinclusively picked out only "disfavored" obscenity.

ernmental bans on discussions of foreign policy questions, labor disputes, art and so forth:

> If the marketplace of ideas is to remain free and open, governments must not be allowed to choose 'which issues are worth discussing or debating.' To allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth.

Consolidated Edison Co., 447 U.S. at 537-38 (citations omitted).

Strict scrutiny is even more appropriate when the State prohibits one viewpoint, while allowing contrary perspectives, because the distortion of the marketplace of ideas is even more pronounced.[14] As the Court has explained, the principle that "governmental bodies may not prescribe the form or content of individual expression" is designed to "put[] the decision as to what views shall be voiced largely into the hands of each of us . . . and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests."[15]

It is no answer to argue that fighting words are entitled to no First Amendment protection, and therefore that any subcategory of fighting words may be prohibited without distorting the marketplace of ideas.[16]

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[14] *Fowler v. Rhode Island*, 345 U.S. 67 (1953) (invalidating statute that permitted church services, but not other religious meetings, in public parks because of viewpoint discrimination against Jehovah's Witnesses); *Niemotko v. Maryland*, 340 U.S. 268 (1951) (same). As this Court has stated, "[t]here is an 'equality of status in the field of ideas,' and government must afford all points of view an equal opportunity to be heard." *Police Dep't v. Mosley*, 408 U.S. at 96 (footnote omitted).

[15] *Cohen v. California*, 403 U.S. 15, 24 (1971).

[16] Such an extreme view would, for example, permit a State to forbid only fighting words that offend Republicans or Catholics. It would also imply that a State could forbid only obscenity that

To be sure, the Court remarked in dictum in *Chaplinsky v. New Hampshire*, 315 U.S. at 571-72, that "fighting words" are "no essential part of any exposition of ideas."[17] Importantly, however, the Court has construed the fighting words doctrine extremely narrowly, and has overturned every single fighting words conviction that it has reviewed since *Chaplinsky*.[18] Indeed, Members of this Court[19] and commentators[20] have questioned whether

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casts disrepute or contempt on governmental policy, or only libel of government officials.

[17] The quoted language from *Chaplinsky* was wholly unnecessary to the Court's result, and "has served to bedevil First Amendment jurisprudence." Gard, *Fighting Words as Free Speech*, 58 WASH. U.L.Q. 531, 533 (1980); *see* n.20 *infra*.

[18] *See, e.g., Lucas v. Arkansas*, 416 U.S. 919 (1974); *Kelly v. Ohio*, 416 U.S. 923 (1974); *Rosen v. California*, 416 U.S. 924 (1974); *Karlan v. City of Cincinnati*, 416 U.S. 924 (1974); *Eaton v. City of Tulsa*, 415 U.S. 697 (1974); *Hess v. Indiana*, 414 U.S. 105 (1973); *Rosenfeld v. New Jersey*, 408 U.S. 901 (1972); *Lewis v. New Orleans*, 408 U.S. 913 (1972); *Brown v. Oklahoma*, 408 U.S. 914 (1972).

[19] *Gooding v. Wilson*, 405 U.S. 518, 537 (1972) (Blackmun., J., dissenting, joined by Burger, C.J.).

[20] *See, e.g.*, Gard, *Fighting Words as Free Speech*, 58 WASH. U.L.Q. 531, 536 (1980) (post-*Chaplinsky* Supreme Court decisions have rendered fighting words doctrine "nothing more than a quaint reminder of an earlier morality that has no place in a democratic society dedicated to the principle of free expression"); Shea, *"Don't Bother to Smile When You Call Me That"—Fighting Words and the First Amendment*, 63 KY. L.J. 1, 1-2 (1975) ("majority of the U.S. Supreme Court has gradually concluded that fighting words, no matter how narrowly defined, are a protected form of speech"). *See also Village of Skokie v. National Socialist Party of America*, 69 Ill. 2d 605 (1979); Letter from Professor Gerald Gunther to Professor George Parker, Chair of the Student Conduct Legislative Council at Stanford University (May 1, 1989), *reprinted*

Chaplinsky's fighting words doctrine remains good law. Simply put, unless construed narrowly, the fighting words doctrine could be used by majorities to suppress unpopular ideas on the grounds that they are likely to provoke violence.

Moreover, the position of the State in this case, and the opinion of the Minnesota Supreme Court, show that petitioner's "fighting symbol" plainly did communicate an idea—albeit a repugnant one. Thus, the State repeatedly and properly concedes that its prohibition is aimed at the expressive content of a certain class of fighting words: "The State agreed that the act of cross-burning was 'expression' in the sense that a message was intended to be conveyed . . . ."; [21] "It is a question for the trier of fact to determine whether the actor intended that message to be conveyed to the victims; in this case, the fact finder certainly could—and necessarily would—so find." [22]

Similarly, the Minnesota Supreme Court's opinion in this case demonstrates that fighting words may have expressive content. As discussed in detail above, Minnesota

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in STAN. UNIV. CAMPUS REP., May 3, 1989, at 18. In his letter, Professor Gunther reasoned that:

> [T]here has been only *one* case in the history of the Supreme Court in which a majority of the Justices has ever found a statement to be a punishable resort to "fighting words." (That case was *Chaplinsky v. New Hampshire*, a nearly 50-year-old case involving words which would very likely not be found punishable today.) More important, in the nearly half-century since *Chaplinsky*, there have been repeated appeals to the Court to recognize the applicability of the "fighting words" exception. . . . [I]n every one of the subsequent attempted reliances on that exception, the Supreme Court has refused to affirm the challenged convictions. In short, one must wonder about the strength of an exception which, while theoretically recognized, has ever since 1942 not been found apt in practice.

[21] Appellant's Brief at 16.

[22] *Id.* at 19.

seeks to punish petitioner precisely because of the message that his conduct conveyed about a subject of preeminent public concern. It is the crude "notion" of racial superiority communicated by petitioner's acts that Minnesota finds "virulent" and "deplorable"—and hence, unlawful.[23]

At the end of the day, Minnesota may be correct that petitioner's message of racial hatred is too abhorrent for society to tolerate. But, by choosing to punish the communication of *that idea*, Minnesota has conceded that petitioner's conduct does express an idea. Because Minnesota has chosen to criminalize the expression of an idea with a particular content, its regulation is subject to the strictest judicial scrutiny.

III. THE ST. PAUL ANTI-BIAS ORDINANCE DOES NOT SURVIVE STRICT SCRUTINY ANALYSIS.

A governmental restriction on the content of speech will be sustained only if it "is a precisely drawn means of serving a compelling state interest." [24] Minnesota might offer two possible rationales for this ordinance. First, Minnesota might assert a compelling interest in prohibiting the use of bias-motivated symbols in order to maintain public order. *See R.A.V.*, 464 N.W.2d at 511. Second, Minnesota might claim that it has an interest in prohibiting the racially discriminatory and religiously intolerant ideas that accompany certain "fighting words." Under either rationale, the ordinance fails to satisfy the exacting scrutiny required by the First Amendment.

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[23] This Court has repeatedly recognized the efficacy of symbols in communicating ideas. "Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, ideas, institution, or personality, is a short cut from mind to mind." *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. at 632.

[24] *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. at 540. *See also Boos v. Barry*, 485 U.S. 312, 321 (1988); *Texas v. Johnson*, 491 U.S. 397, 413 (1989).

A. The State's Interest in Prohibiting the Use of Bias-Motivated Symbols in Order to Maintain Public Order Is Neither Implicated Nor Compelling in This Case.

Minnesota's interest in prohibiting the use of bias-motivated symbols that amount to "fighting words" is not compelling in this case, and even if it were, the anti-bias ordinance is not a narrowly tailored means of achieving that end. To be sure, Minnesota has an interest in maintaining public order, and it arguably may be permitted to achieve this end by prohibiting all "fighting words." [25] Indeed, Minnesota already has a general prohibition against all "fighting words," regardless of their content. *See* Minn. Stat. Ann. § 609.72, Subd. 1(3) (1990) (construed in *In re S.L.J.*, 263 N.W.2d 412, 418-19 (Minn. 1978), as reaching "offensive, obscene, or abusive language or boisterous and noisy conduct" which constitutes "fighting words").

Because the State already has a content-neutral law prohibiting "fighting words," its interest in further prohibiting the subset of "fighting words" at issue in this case is not compelling. In *Texas v. Johnson*, this Court observed that Texas had no significant interest in punishing flag desecration in order to keep the peace because Texas already had a statute specifically prohibiting breaches of the peace. 491 U.S. at 410. The same logic applies in this case as Minnesota already has a statute that, as interpreted by the Minnesota Supreme Court, prohibits "fighting words" and "imminent lawless action."

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[25] As discussed above, there is good reason to apply *Chaplinsky* with caution, particularly where speech or expressive conduct concerns issues of general public importance. Any fighting words prohibition must be read to embrace only words which "have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed." *Chaplinsky*, 315 U.S. at 573 (citations omitted). *See Houston v. Hill*, 482 U.S. 451, 462 (1987).

Even if one assumed that Minnesota's interest in preserving public order were implicated, this ordinance is not a "precisely drawn means of serving that interest." [26] In fact, the State's attempt to prohibit only a subcategory of fighting words is "strikingly underinclusive." *Erznoznik v. City of Jacksonville*, 422 U.S. at 214. Although a legislature may often deal with only one part of a problem without addressing the entire problem,[27] content-based restrictions on speech trigger the most exacting judicial scrutiny.

Thus, in *Erznoznik v. City of Jacksonville*, this Court struck down a law prohibiting drive-in theaters from showing nude scenes if these movies could be seen from a public place. Although the State asserted an interest in preventing traffic hazards, the Court emphasized the underinclusiveness of the ordinance and concluded that the regulation impermissibly singled out movies with nudity for special treatment while failing to regulate other movies which created the same alleged risk to traffic. 422 U.S. at 214. Similarly, in *Police Department v. Mosley*, 408 U.S. at 100, the Court acknowledged that cities may have a substantial interest in prohibiting picketing that disrupts a school, but held that the city may not ban non-labor picketing "unless that picketing is clearly more disruptive than the picketing Chicago . . . permits."

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[26] *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 540 (1980). This Court can reach the question of whether Minnesota has a compelling interest in prohibiting fighting words "based on race, color, creed, religion, or gender," without deciding the question whether the State has an interest in prohibiting all fighting words. *See Boos v. Barry*, 485 U.S. 312, 324 (1988) ("Even if we assume that [the] law recognizes a dignity interest and that it should be considered sufficiently 'compelling' to support a content-based restriction on speech, we conclude that [this provision] is not narrowly tailored to serve that interest.").

[27] *See, e.g., Williamson v. Lee Optical Co.*, 348 U.S. 483, 488-489 (1955).

This case is no different. If the St. Paul ordinance is intended to prevent violence, then there is no reason for confining the prohibition to a limited category of fighting words. As Justice Black observed in *Cox v. Louisiana*, Minnesota "is attempting to pick and choose among the views it is willing to have discussed on its streets." 379 U.S. at 580-81.

B. The St. Paul Ordinance May Not Constitutionally Prohibit the Ideas That Accompany Certain "Fighting Words."

In its brief in the Supreme Court of Minnesota, the State asserted that the legislature has a "legitimate" and "paramount concern" in limiting racist speech that constitutes fighting words.[28] Likewise, the Minnesota Supreme Court opinion affirmed the responsibility . . . of diverse communities to confront [notions of racial supremacy] in whatever form they appear." *R.A.V.*, 464 N.W.2d at 508. In short, the State is concerned not with prohibiting "fighting words," but only with banning messages of racial and religious bigotry and intolerance.

Petitioner's crude message of racial hatred is plainly inconsistent with the highest aspirations of this Nation. The Fourteenth Amendment's Equal Protection Clause and the First Amendment's Free Exercise Clause, along with landmark federal legislation, testify to our commitment to the goals of racial and religious harmony and gender equality. But the First Amendment does not permit the State to prohibit the communication of ideas simply because they are contrary to this commitment. This Court has recently emphasized that "[t]he First Amendment does not guarantee that other concepts virtually sacred to our Nation as a whole—such as the principle that discrimination based on race is odious and

[28] Appellant's Brief at 26.

destructive—will go unquestioned in the marketplace of ideas." *Texas v. Johnson*, 491 U.S. at 418.[29]

There can be no doubt that the notions of racial supremacy expressed by petitioner are offensive. If petitioner's notions of racial supremacy gained wide currency, our nation would suffer. But this Court has repeatedly held that the First Amendment forbids the assumption that ideas are in themselves "offensive" or "harmful."[30] Instead, the First Amendment is based upon the belief that "people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communications rather than to close them." *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976).[31]

[29] *See Terminiello v. Chicago*, 337 U.S. 1, 4 (1949); *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). Lower federal courts have also refused to exempt antisocial speech from the protection of the First Amendment. For example, when Indiana enacted antipornography legislation, the Seventh Circuit invalidated the statute, explaining:

> Racial bigotry, anti-semitism, violence on television, reporters' biases—these and many more influence the culture and shape our socialization. None is directly answerable by more speech, unless that speech too finds its place in the popular culture. Yet all is protected as speech, however insidious. Any other answer leaves the government in control of all the institutions of culture, the great censor and director of which thoughts are good for us.

American Booksellers Ass'n v. Hudnut, 771 F.2d 323, 330 (7th Cir. 1985) (Easterbrook, J.), *aff'd mem.*, 475 U.S. 1001 (1986).

[30] *Texas v. Johnson*, 491 U.S. at 414.

[31] *See also First Nat'l Bank v. Bellotti*, 435 U.S. 765, 792 (1978) ("[I]f there be any danger that the people cannot evaluate the information and arguments advanced [in public exchanges], it is a danger contemplated by the Framers of the First Amendment."); *Linmark Assocs. v. Willingboro*, 431 U.S. 85, 97 (1977) (rejecting "'highly paternalistic'" argument that ban on "For Sale" signs was necessary to protect citizens' welfare: "'[i]t is precisely this kind

Under the First Amendment, the remedy for repugnant ideas and pernicious philosophies is not governmental suppression. Such an approach would inevitably invite the prohibition of unpopular minority viewpoints—as occurred with the socialist movement during the early decades of this century.[32] And it would preempt the process of open public discussion of competing philosophies and viewpoints—which under the Constitution is our best determinant of truth and falsity.

CONCLUSION

For these reasons, the judgment of the court below should be reversed.

Respectfully submitted,

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of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us.'") (quoting *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. at 770); *Thornhill v. Alabama*, 310 U.S. 88 (1940).

[32] *See, e.g., Schenck v. United States*, 249 U.S. 47 (1919); *Debs v. United States*, 249 U.S. 211 (1919).

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